

RECEIVED

DEC 28 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYBEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	FCC 93-451
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New Personal	)	
Communications Services	)	RM-7140, RM-7175, RM 7618
	)	

## COMMENTS TO PETITIONS FOR RECONSIDERATION

Hill and Welch, a communications law firm, pursuant to the Commission's December 13, 1993 Public Notice, Report No. 1992, hereby comments on the Rand-McNally issue raised by a few of the petitions for reconsideration<sup>1</sup> which were filed in the referenced docketed proceeding. In support whereof, the following is respectfully submitted:

1) Hill and Welch is a communications law firm located in Washington, D.C. which specializes in the various industries affected by the Commission's rules, including personal communications. We represent many small, independent wireline telephone companies and many small non-wireline Part 22 service providers. Rand-McNally's asserted copyright claim will cause severe economic hardship to the undersigned counsel's law firm and to its clients.

<sup>1</sup> Because of the number of filers in the instant proceeding, and because the instant pleading discusses one issue raised by only a few petitioners, the instant comments are being served upon Rand-McNally and others commenting on the copyright issue of whom we are aware. If requested, we shall serve additional parties as directed by the Commission.

No. of Copies rec'd  
List A B C D E

2) On December 10, 1993 undersigned counsel visited the Washington, D.C. Rand-McNally store located on Connecticut Ave., N.W. to inquire into the purchase of Rand-McNally's Commercial Atlas to ascertain the county make-up of the Commission mandated MTA's and BTA's. The Rand-McNally store had a limited supply of the 1993 Commercial Atlas in stock. While undersigned counsel did not check the exact page count, the Commercial Atlas appeared to be approximately 400 pages.<sup>2</sup> The critical county information was contained in a two page map.

3) Because undersigned counsel required only two pages of a very large book, he examined the front pages of the book to ascertain Rand-McNally's copyright claim.<sup>3</sup> The copyright notice contained a stern warning that any copying of the information from the Commercial Atlas would be a copyright infringement.<sup>4</sup> However, Rand-McNally's copyright notice provided that Rand-McNally would supply as many copies of any information contained within the Commercial Atlas as requested by a consumer.

4) Undersigned counsel inquired of the store representatives as to the procedure to obtain copies of the maps and he was

---

<sup>2</sup> The physical dimensions of the Commercial Atlas are immense, perhaps measuring 2 1/2 ft. x 1 1/2 ft. when opened.

<sup>3</sup> Thus, 99.5% of the Commercial Atlas is of no use to undersigned counsel or to its clients.

<sup>4</sup> We shall discuss Rand-McNally's bogus copyright claim below.

provided an 800 number to contact Rand-McNally.<sup>5</sup> Undersigned counsel contacted Rand-McNally and was informed that Rand-McNally no longer offered a service in which copies of its maps could be obtained. Because the 1993 Commercial Atlas contained the offer to make copies, the change in policy appears to have been recent and apparently resulted from the Commission's designation of the Commercial Atlas as the Rosetta Stone of the PCS industry.<sup>6</sup>

5) Undersigned counsel was informed that various possibilities existed as to how he could procure the MTA/BTA information. First, he could buy a Commercial Atlas for each of his clients.<sup>7</sup> Even if the \$395 charge for each client was not itself exorbitant, undersigned counsel would have to incur the shipping and handling expenses related to the shipping of this mammoth book. Moreover, there is no evidence that Rand-McNally is able to supply the thousands and thousands of books required by the PCS industry

---

<sup>5</sup> 1-800-333-0136 ask for Ann Adams. We learned that the person in charge of map copyrights is Rebecca Engleking, 708-329-2336.

<sup>6</sup> The Commission has unwittingly made Rand-McNally an unregulated monopoly provider of information critical to the filing of PCS applications. Rand-McNally's pricing actions coupled with its decision not to duplicate maps upon request indicate that Rand-McNally is using its monopoly position in an anticompetitive manner. The Commission should refer this matter to the Federal Trade Commission for investigation.

<sup>7</sup> The Commercial Atlas sells for \$395. Undersigned counsel has approximately 230 clients which are interested in the PCS proceeding. Thus, undersigned counsel would have to expend \$90,850 to provide the information to his client base.

because a week later undersigned counsel again visited the store and the Commercial Atlas was out of stock.

6) Second, undersigned counsel was informed that he could obtain a diskette for \$1,000 which would contain the county grouping information. However, Rand-McNally indicated that counsel would not be able to disclose this information to his clients.<sup>8</sup>

7) A third option offered by Rand-McNally was for undersigned counsel to pay \$12,000 for the county information. In addition, counsel would have to pay some unspecified sum on a per client basis to provide the information to his client base.

8) The Commission should not tolerate Rand-McNally's price gouging for one moment. This law office does not have the tens of thousands of dollars demanded by Rand-McNally to establish a practice in the PCS industry. Moreover, Rand-McNally's exorbitant charges were not considered by the Commission in the underlying rule making relating to the effects upon small businesses. Thus, the adoption of the Rand-McNally MTA/BTA standard violated the Administrative Procedure Act and the Regulatory Flexibility Act.

9) Without belaboring the point, Rand-McNally cannot claim a copyright to either the county listings or to the maps which represent those county listings. Footnote 33 of Telocator's Petition for Reconsideration lists a number of cases which support

---

<sup>8</sup> Undersigned counsel does not understand what value this offer has. He might as well buy the Commercial Atlas to get the MTA/BTA information as well as obtain thousands of other facts, however irrelevant to his practice.

the proposition that county listings cannot be copyrighted.<sup>9</sup> An additional case for the Commission to consider is Feist Publication, Inc. v. Rural Telephone Service Telephone, Inc., 499 U.S. \_\_\_\_ (1991); 113 L Ed. 2d 358.

10) In a rare 9-0 decision<sup>10</sup>, the Feist Supreme Court determined that mere lists of facts were not copyrightable, regardless of the amount of effort which was required to compile the list.<sup>11</sup> Rarely does the Supreme Court issue a full opinion in which all Justices agree with the result and in which eight of nine joined in a single opinion.

11) In the instant case, Rand-McNally's county groupings are merely lists of counties in which no work of authorship is involved. Rand-McNally can claim no proprietary interest in county names. Additionally, Rand-McNally's maps merely depict in graphic form the factual existence of city, county, and state locations and the factual existence of economic traffic flow. The fact that a ton of coal is shipped from here to there is a fact which cannot

---

<sup>9</sup> Unlike Telocator, we are not willing to concede that a map may be copyrighted.

<sup>10</sup> Eight Justices joined in the opinion, there was one concurrence.

<sup>11</sup> In Feist the Supreme Court determined that telephone white pages were not copyrightable because a compilation of telephone subscribers involved no work of authorship, i.e., creativity. "Sweat of the brow" has no bearing in copyright law.

be copyrighted no matter how much effort Rand-McNally expended to learn that fact.<sup>12</sup>

12) Rand-McNally cannot claim a valid copyright in either the county groupings or in the maps which it produces. However, to eliminate expensive litigation which may ensue in Rand-McNally's attempt to assert a bogus copyright claim, and the attendant hardship such a claim would cause to small business, the Commission should dispense with the MTA/BTA designation scheme and use the MSA/RSA market scheme used in cellular radio. Thereafter, Rand-McNally could sell its MTA/BTA information, absent a Federally sponsored monopoly, for whatever prices the market could bear.

13) While the Commission has indicated that the MTA/BTA scheme better tracks economic patterns than does the MSA/RSA scheme, licensees can adjust, if required. There is no guarantee that Rand-McNally's county groupings will mirror the way PCS will be used and there is no guarantee that the economic patterns will not change in the future.

14) Perhaps the MSA/RSA scheme is not perfect, but so little is. The communications industry has already invested thousands of hours learning, and becoming comfortable with, the MSA/RSA filing scheme. Why dispense with something which has been used successfully to resort to something new and unknown, especially where the

---

<sup>12</sup> Rand-McNally is asserting a copyright claim before the Commission. Rand-McNally should explain its position in light of Feist. Rand-McNally's failure to discuss the issue should be taken as an admission that no valid copyright claim exists.

private source of the filing information has threatened litigation to protect its information? Why should the Commission publicly approve Rand-McNally's dubious copyright claim?

15) If law suits are filed, it is a good bet that the Commission will be drawn into those suits by defendants asserting that the Federal Government authorized the use of the information. These needless legal entanglements can be avoided by sticking with the tried and true MSA/RSA market filing structure.

16) Finally, we shall briefly discuss Rand-McNally's December 8, 1993 Proposal for Disclosure of RMC BTA/MTA County Listings by FCC. As we understand Rand-McNally's offer, the FCC may reproduce the MTA/BTA lists in its Rules. Rand-McNally further indicates that recipients of the Rules may use the information for the purposes of preparing applications and participating in auctions. Every person and business entity in the United States is the "recipient" of the Commission's Rules upon publication of those rules. Thus, it would appear that Rand-McNally has offered a deal in which every person in the country could use the MTA/BTA information without paying Rand-McNally a fee.<sup>13</sup>

17) However, we are concerned that Rand-McNally's offer appears to assert that if our office charges a fee for preparation of applications which contain the MTA/BTA information, that Rand-

---

<sup>13</sup> Of course, after reviewing this offer, we wonder why Rand-McNally attempted to take tens of thousands of dollars from us without disclosing this option to us.


McNally would be entitled to some undefined fee.<sup>14</sup> As noted above, the Commission has not studied the impact that Rand-McNally's undefined fees will have on small business entities. Of course, undefined fees would be inherently suspect before a reviewing court.

18) Moreover, item #4 in Rand-McNally's Proposal is ambiguous and is not covered by Rand-McNally's suggested copyright notice. Thus, Rand-McNally's Proposal is too confusing to be made a part of the Commission's Rules.

WHEREFORE, in view of the information presented herein, the Commission should reconsider its decision to adopt the Rand-McNally MTA/BTA market structure. The Commission should not publicly acknowledge Rand-McNally's disputed copyright claim by accepting Rand-McNally's Proposal.<sup>15</sup> The Commission should adopt the MSA/RSA market structure.

Hill & Welch  
Suite #113  
1330 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 775-0070  
December 28, 1993

Respectfully submitted,

  
Timothy E. Welch

---

<sup>14</sup> ". . . reproduction or resale . . . of the listings or any part thereof to create derivative works for resale will not be permitted without a license from RMC."

<sup>15</sup> While the Commission's adoption of Rand-McNally's proposal would likely have little weight in a copyright dispute, it is a hurdle which need not be imposed upon small businesses.



CERTIFICATE OF SERVICE


I hereby certify that I have this 28th day of December 1993 sent a copy of the foregoing Comments To Petitions for Reconsideration to the following by first class United States mail, postage prepaid:

Deborah Lipoff, Esq.  
Assistant General Counsel  
Rand McNally  
8255 North Central Park  
Skokie, IL 60076

Thomas Stoup  
Telocator  
1019 19th Street, N.W. #1100  
Washington, D.C. 20036

John Hearne, Chairman  
Point Communications Company  
100 Wilshire Blvd. #1000  
Santa Monica, CA 90401

Michael Killen, President  
Killen & Associates, Inc.  
382 Fulton Street  
Palo Alto, CA 94301

  
\_\_\_\_\_  
Timothy E. Welch